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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 590.

HERMAN O. HAGNER and JULIA C. HAGNER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONERS.

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In The

Supreme Court of the United States

October Term, 1931.

No. 590.

Herman O. Hagner and Julia C. Hagner,
Petitioners,

v.

The United States of America,
Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals of the District of Columbia has not yet been reported. It will be found at page 10 of the record.

Jurisdiction.

The judgment of the Court of Appeals of the District of Columbia was entered November 23, 1931 (R. 17), a petition for rehearing being denied December 5, 1931 (R. 18). Petition for a Writ of Certiorari was filed December 24, 1931, and was granted January 25, 1932 (R. 19). The jurisdiction of this Court rests upon Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Supreme Court of the District of Columbia has jurisdiction of a crime alleged to have been committed in Pennsylvania.

2. Assuming that the Supreme Court of the District of Columbia has jurisdiction of a crime alleged to have been committed in Pennsylvania, are the provisions of Article III, Section 2, Clause 3, and Amendment 6 of the Constitution of the United States, relative to trial by jury of the State and District wherein the offense was committed, capable of being waived?

3. Assuming they were capable of being waived, were they waived when petitioners demanded trial by jury, pleaded not guilty and later filed a Motion in Arrest of Judgment?

Statutes Involved.

Section 215, Criminal Code:

"Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice * * * place, or cause to be placed, any letter * * * in any post office, * * * to be

sent or delivered * * *, or shall take or receive any such therefrom * * *, or shall knowingly cause to be delivered by mail according to the direction thereon * * * any such letter * * * shall be fined * * *, or imprisoned * * *."

The Code of the District of Columbia (completed to March 4, 1929, title 18, sec. 43):

"43. *Jurisdiction; Powers of Circuit and District Courts Conferred.* The said Court shall possess the same powers and exercise the same jurisdiction as the District Courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)

"44. *Same; General Jurisdiction.* Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District, and of all cases in law and equity between parties, * * *."

Constitution.

Article III, Section 2, Clause 3 of the Constitution of the United States:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the State where the said crimes shall have been committed."

Amendment 6 of the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Statement of Facts.

Defendants herein were indicted and tried in the Supreme Court of the District of Columbia for violating Section 215, United States Criminal Code (U. S. C. A. Tit. 18, Sec. 338). The indictment, after describing an alleged scheme and artifice to defraud, averred that the defendants, for the purpose of executing said scheme and artifice, did place and cause to be placed in the post office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the post office establishment of the United States, certain described mail matter. The indictment did not charge that the defendants had knowingly caused such matter to be delivered in the District of Columbia (R. 1-3).

A jury found defendants guilty and thereupon they moved in arrest of judgment, which motion was denied (R. 4, 5). An appeal was taken to the Court of Appeals of the District of Columbia. That Court, while holding the indictment charged no offense to have been committed in the District of Columbia but that instead it alleged the offense was committed in Pennsylvania (R. 11-12), affirmed the judgment of conviction on the authority of *Patton* v. *U. S.*, 281 U. S. 276, and held that the defendants had as completely agreed to waive "their Constitutional privilege to refuse to be tried in the District of Columbia" as though their "waiver" were in express words; and that defendants might not, by Motion in Arrest of Judgment, point out the lack of the court's jurisdiction (R. 16-17).

Specification of Error.

The Court of Appeals of the District of Columbia erred in holding that the Supreme Court of the District of Columbia had jurisdiction to try petitioners upon the indictment herein and in denying petitioners' Motion in Arrest of Judgment (R. 5).

Summary of Argument.

1. The indictment, under the decision below and the authorities, charges no offense to have been committed in the District of Columbia but charges the offense was committed in Pennsylvania.

2. The criminal jurisdiction of the Supreme Court of the District of Columbia is limited by Section 44 of the Code of the District of Columbia to crimes and offenses committed within said District.

3. There is no such thing as extraterritorial jurisdiction of the District Courts of the United States or of the Supreme Court of the District of Columbia.

4. Even assuming the Supreme Court of the District of Columbia has an extraterritorial jurisdiction, the provisions of the Constitution, Article III, Section 2, and Amendment 6, require the trial to be in the State and District wherein the crime was committed, i. e. Pennsylvania, and such Constitutional provisions cannot be "waived."

5. Even if they could be waived, petitioners herein did not waive them, but on the contrary invoked them when they demanded a jury trial, pleaded not guilty and later moved in arrest of judgment.

6. The decision below violates the caution contained in *Patton* v. *United States, supra,* against waiver by *implication* of Constitutional rights.

ARGUMENT.

I.

The Indictment Herein Charges No Offense to Have Been Committed in the District of Columbia, but Alleges That the Offense Was Committed in Pennsylvania.

The indictment herein alleges a violation of Section 215, U. S. Criminal Code. The Court below in its opinion describes it as follows:

> "The indictment here charges, as we have seen, a scheme to defraud and also that for the purpose of executing it defendants (appellants) placed a letter in the post office in the city of Scranton, to be sent and delivered by the post office establishment to the addressee thereof in Washington, but it wholly failed to charge the delivery of the letter at the point of destination. It will thus be seen that the indictment is drawn in accordance with the language of the first provision of the statute making it an offense, under the circumstances alleged, to place a letter in a post office to be sent or delivered to the addressee thereof, and the question is whether such a charge, alleging only the act of mailing or depositing the letter in Pennsylvania, is triable in the District of Columbia.
>
> "The original statute (215 Criminal Code) did not contain the clause now in the statute making it also an offense for the deviser of the scheme to cause a letter 'to be delivered by the mails according to the direction thereon' and the Supreme Court, speaking of the statute as it formerly was, has declared the place of the deposit to be the place of the commission of the offense. *Salinger* v. *Loisel*, 265 U. S. 224, 234. And at the same time, speaking of the effect and purpose of the introduction of the new clause into the statute, said:

"'That clause plainly provides for the punishment of the deviser of the scheme or artifice where he causes a letter in furtherance of it to be delivered by the mail according to the direction of the letter. This is done by way of enlarging the original definition of the offense, the clause dealing with the placing of such a letter in a mail depository being retained. Evidently Congress intended to make the statute more effective, and to that end to change it so that, where the letter is delivered according to the direction, such wrongful use of the mail may be dealt with in the district of the delivery as well as in that of the deposit.'

"That is to say, we assume, that under the present statute the Government may elect whether to bring the indictment in the district in which the letter is mailed or the district in which it is received, but obviously in either case the proper averments are essential.

"As the indictment in the present case charges the deposit of the letter in Scranton, and does not charge the delivery of the letter in the District of Columbia, it seems to us clear that appellants were not triable under it in the latter place. The placing of the letter in the post office in Scranton under the circumstances related in the indictment was, of course, sufficient to charge an offense committed there and triable there on a similar indictment found there, but the mailing alone without also charging delivery in Washington is not, we think, sufficient to charge an offense committed in the District of Columbia and triable there, for it is only by virtue of the amendment of the statute and upon the allegation that the letter mailed in the one place was duly delivered in the other that an offense may properly be charged and tried in the latter; and if this were all, we should have to reverse" (R. 11-13).

The Court below then goes on to say that petitioners have, however, waived, by failing seasonably to object, their right to be tried in Pennsylvania.

The decision of the Court below, as to failure to allege an offense in the District of Columbia, follows the decision of this Court in *Salinger* v. *Loisel*, 265 U. S. 264, 68 L. Ed. 989, and the following cases:

United States v. *Sauer*, 88 F. 249;
Stewart v. *United States*, 119 F. 89;
United States v. *Conrad*, 59 F. 458.

From the above cases it will be seen that where it is desired to charge a violation of Section 215 in the place where the letter is delivered it is an absolute prerequisite to such charge that the indictment should allege the delivery of the letter in that place.

II.

Section 44, Title 18, of the Code of the District of Columbia Limits the Criminal Jurisdiction of the Supreme Court of the District of Columbia to Crimes and Offenses Committed Within Said District.

The Court below in its decision overlooks the distinction between *venue* and the *territorial jurisdiction* of the Supreme Court of the District of Columbia. It is petitioners' claim that the jurisdiction of that court is territorially limited, by a specific statute, not noticed by the court below in its opinion, to crimes and offenses *committed in the District of Columbia*.

If so territorially limited, there is no way for petitioners to "waive" their "right" to be tried in Penn-

sylvania for the reason that the Supreme Court of the District of Columbia would have no jurisdiction, waiver or no waiver, due to the absolute lack of a statutory grant of judicial power. No authorities are needed to show that a defendant in a criminal case cannot "waive" jurisdiction in the sense of adding territory to the jurisdiction of a Federal court beyond the confines provided by statute.

Pertinent statutes are as follows:

The Code of the District of Columbia (completed to March 4, 1929), title 18, sec. 43:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a Court of the United States." (Mar. 3, 1863, 12 Stat. c. 91; Mar. 3, 1901, 31 Stat. 1189, c. 854, Sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; March 3, 1911, 36 Stat. 1166, c. 231, sec. 289.)
>
> "44. *Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties, * * * *."

Sec. 44 specifically limits the criminal jurisdiction of the Supreme Court of the District of Columbia to "crimes and offenses committed within said District." The words "except as otherwise provided in this title" in Sec. 44 above, are not found in any of the Acts of Congress making up Sec. 44, and are apparently the interpolation of the codifier. In any case they refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia conferred in Chapter 4 and Chapter 6 of the same title (Title 18, Code of the District of Columbia).

The decision of the Court below amounts to holding that Sec. 43 contains a broader grant of territorial jurisdiction than Sec. 44. It seems to counsel that such a construction is open to considerable argument.

Sec. 44 would seem to be a specific enactment limiting the general terms of Sec. 43, even if "jurisdiction" in Sec. 43 be held to mean "territorial jurisdiction." The well known provision of the Constitution, which Congress must be presumed to have had in mind when it enacted Sec. 43, above, that the trial of crimes should be in the State wherein the crime was committed, is a strong indication that Congress did not intend "jurisdiction" in Sec. 43 to refer in any way to territorial jurisdiction but used it to indicate the *class* of cases over which the court should have power. Congress must be presumed to have legislated with regard to the general rule prescribed by the Constitution that the trial of crimes shall be in the State and district wherein the crime was committed rather than with reference to the possible exception of a waiver (not then judicially sanctioned) of that rule by a defendant. The total absence of a general Federal venue statute relative to crimes is likewise a strong indication that Congress considered the constitutional provisions so clear as to render unnecessary specific legislation territorially limiting the criminal jurisdiction of the District Courts. The statement by the Court below in its opinion

> "Except, therefore, that the Constitution provides the venue for trial of offenses against the laws of the United States, *there is nothing otherwise to prevent the enactment by Congress of a law* permitting and providing for the trial of criminal cases anywhere within the United States."

raises the serious question, independently of what counsel believe to be the controlling provisions of Sec. 44 above, and even if a waiver be conceded, as to whether Congress has, in point of fact, conferred extraterritorial jurisdiction on the Supreme Court of the District of Columbia. The only possible basis, as seen above, for that contention, is the construction of the Court below that "jurisdiction" in Sec. 43 means "territorial jurisdiction" instead of obviously meaning jurisdiction of the *subject-matter*.

Conceding, *arguendo*, that as said by the Court below "there is nothing to prevent the enactment by Congress of a law permitting and providing for the trial of criminal cases anywhere in the United States" it is in the highest degree unlikely that Congress has already done so. In fact, the history of Congressional legislation in this country for over a hundred years shows a scrupulous care on the part of Congress clearly to delimit and define the territorial jurisdiction of each Judicial District. It is altogether surprising to counsel to hear it said by any Court that because Sec. 24 of the Judicial Code confers on the district courts jurisdiction of "all crimes and offenses cognizable under the authority of the United States," the Supreme Court of the District of Columbia has jurisdiction of crimes and offenses committed in any state in the Union. It seems obvious that "jurisdiction" in Sec. 24, Judicial Code, and Sec. 43, Title 18, D. C. Code, refers to jurisdiction of the *subject-matter*, not to *territorial jurisdiction*. The *territorial jurisdiction* of the District Courts is set forth in the statutes geographically defining the various Judicial Districts (Judicial Code, Sec. 69-116). The territorial jurisdiction of the Supreme Court of the District of Columbia is set forth, equally clearly, in Sec. 44, Title 18, D. C. Code.

For the convenience of the Court there is attached

hereto, as Appendix I, the legislative history of Sec. 43 and 44 of the District of Columbia Code, from which it will be seen that Sec. 44 is a specific enactment limiting the general provisions of Sec. 43.

It may be noted that this Court has already held in *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214, that the jurisdiction of the Supreme Court of the District of Columbia in criminal matters is limited to jurisdiction *"to hear and punish crimes and offenses committed within the District."*

III.

There Is No Such Thing as Extraterritorial Jurisdiction of the District Courts of the United States, or of the Supreme Court of the District of Columbia.

The decision of the Court below reduces itself to this: (1) The Supreme Court of the District of Columbia under Section 24 of the Judicial Code has the "jurisdiction" of the District Courts; (2) there is a District Court in Pennsylvania, wherein the indictment charges the offense was committed; (3) the defendants could be tried in the District Court of Pennsylvania if they insist on the Constitutional venue provisions; (4) they have waived such provisions, and the Supreme Court of the District of Columbia having the jurisdiction of the District Courts of Pennsylvania, they can be tried here.

The meaning of "jurisdiction" in Section 24 of the Judicial Code, as referring to jurisdiction of the *subject matter*, has already been discussed. But aside from this, which seems sufficiently obvious, nothing is better settled than that the United States District Courts exercise a strictly territorial jurisdiction. The

decision below amounts to holding that each district court has the *territorial jurisdiction* of all the other district courts. Only in such a way can the Supreme Court of the District of Columbia be invested with the territorial jurisdiction of the United States District Courts of Pennsylvania.

As opposed to this view it may be said that for over a century it has been consistently held that United States Courts exercise a strictly territorial jurisdiction. Thus, this Court in *Toland* v. *Sprague*, 12 Peters 300, 328, decided in 1838, said with reference to the old circuit courts:

> "The judiciary act has divided the United States into judicial districts. Within these districts a circuit court is required to be holden. The circuit court of each district sits within and for that district; and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the district."

These principles have been applied in the following cases:

U. S. v. *Alberty*, Fed. Cas. No. 14426;
Ex Parte Graham, Fed. Cas. No. 5657;
Wilson v. *Graham*, Fed. Cas. No. 17804;
Gopsevic v. *California Packing Co.*, 272 F. 994;
In re Geller, 216 F. 561;
Staunton v. *Wooden*, 179 F. 64;
U. S. v. *Stern*, 177 F. 480;
Walker v. *Lea*, 47 F. 649.

As to the decision in *Patton* v. *United States*, *supra*, this court certainly never intended that case to be made the basis of such a drastic alteration in the rules of criminal pleading as to dispense with the necessity for the allegation of venue in an indictment. In fact, it is

only through the allegation of venue that a court initially acquires jurisdiction. If, therefore, venue must be alleged, it must be alleged somewhere.

Under the decision below, and the law, if the indictment herein does not lay it in the District of Columbia it lays it in Pensylvania. If it is laid in Pennsylvania and the Supreme Court of the District of Columbia takes cognizance of the crime and tries the offenders, or puts them into a position to plead, or waive, or do anything else, it is submitted that the Court exercises an extraterritorial jurisdiction and this, under the law, it cannot do.

IV.

Assuming, for the Sake of Argument, That the Supreme Court of the District of Columbia Has Territorial Jurisdiction Reaching into Pennsylvania, or Assuming, Which Seems Equally Fantastic, That There Is No Such Thing as Territorial Jurisdiction, Which Is What the Opinion of the Court Below Ultimately Resolves Itself Into, It Seems Extremely Doubtful to Counsel That the Provisions of Article III, Section 2, and Amendment 6 of the Constitution Relative to Trial by Jury of the State and District Wherein the Offense Was Committed, can Be "Waived."

The Court below seems to have taken for granted that because this Court held, in *Patton* v. *U. S.*, 281 U. S. 276, that a defendant by an express and intelligent waiver could constitutionally waive his right to be tried by a full jury of twelve, that a defendant likewise can be inferred to "waive" his "right" to be tried by an impartial jury in the state and in the district wherein the crime has been committed, which

district shall have been previously ascertained by law. The constitutional provisions are as follows:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed" (Article III, Section 2).
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment 6).

There is no question in the present case of the application of the above sections to the District of Columbia for the reason that the indictment alleges the offense was committed in Pensylvania, and the Court below so held. In addition, the Sixth Amendment has been held applicable to the District of Columbia (*Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Callan* v. *Wilson*, 127 U. S. 540). There is, therefore, squarely presented the question whether these constitutional provisions are not mandatory upon the Government. The Court below held, on the authority of *Patton* v. *U. S.*, *supra*, that they could be waived. If so, there is a clear conflict of decision between *Patton* v. *U. S.*, *supra*, and *Salinger* v. *Loisel*, 265 U. S. 224, 68 L. Ed. 989, wherein this Court said:

> "It must be conceded that, under the 6th Amendment to the Constitution, the accused cannot be tried in one district on an indictment showing that the offense was not committed in that district."

There are several indications that the provisions of Article III, Section 2, above, cannot be waived. The

words "and such trial shall be held in the state where the said crimes shall have been committed" are clearly directed to the Government and not to the defendant. They constitute a limitation upon the powers of the Government with reference to place of trial, instead of conferring, as held below, an option upon the defendant. If they be interpreted to mean that a "right" is accorded the defendant, an enigma is presented as to how the defendant may avail himself of that "right." It should be noted that the provision states "where the said crimes shall have been committed," not where the said crimes shall be *alleged* to have been committed. If, therefore, this provision be interpreted as conferring a waivable right upon a defendant it leads to the conclusion that he must confess his crime before he can assert the right. Certainly no such construction seems reasonable in view of other provisions of the Constitution prohibiting compulsory self-incrimination. It is illogical to suppose that a defendant must give up one right under the Constitution in order to assert another.

The provisions of the 6th Amendment are likewise mandatory as to the place where the trial shall be had. They are likewise directed to the Government in the form of a limitation upon Governmental power. The words, "the accused shall enjoy the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed," prescribe not merely the place of trial, but the source of the jury by which the accused shall be tried. The words, "which district shall have been previously ascertained by law," are a further indication that this requirement operates retrospectively upon the Government, instead of conferring a mere privilege upon the defendant. In fact this provision of the Constitution must be violated by the Government before a defendant would ever be

in a position wherein he would be required to assert his right.

The statement by the Court below that there is no Federal criminal venue statute is no aid to that Court in its opinion. The obvious reason why no Federal criminal venue statute exists is the clear and explicit provisions of the Constitution. Congress never thought it necessary that any statute should be passed further safeguarding provisions of the Constitution which seem so clear that they are self-sufficient. Certainly until the present case no one imagined that any Federal Court could exercise a criminal jurisdiction beyond the confines of the judicial district wherein it was located, in the case of the District courts, or beyond the District of Columbia in the case of the Supreme Court of the District of Columbia.

The decision of this Court in *Patton* v. *United States, supra,* does not seem to be at variance with these views. In *Patton* v. *United States, supra,* this Court held that the jury referred to in the Constitution, Article III, Section 2, Clause 3, and the 6th Amendment meant a jury as it was understood and known at common law, the essential elements of which it described as follows:

1. It should consist of twelve men.
2. The trial should be in the presence and under the superintendence of the Judge, etc.
3. The verdict should be unanimous.

It will no doubt be conceded by this Court that it did not in so describing the elements of a constitutional and common law jury mean to characterize such elements as exclusive, *i.e.*, there might be other elements of a common law jury not mentioned in the Patton case. One such element is the familiar requirement that it should be a jury of the vicinage. Thus Mr. Justice Story says:

"It is observable, that the trial of all crimes is not only to be by jury, but to be held in the State where they are committed. The object of this clause is to secure the party accused from being dragged through a trial in some distant State, away from his friends, and witnesses, and neighborhood, and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities or prejudices against him. Besides this, a trial in a distant State or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that Congress would ever exert their power in such an oppressive and unjustifiable manner. But upon a subject so vital to the security of the citizen it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to have been committed.

* * * * * * *

It was doubtless by analogy to this rule of the common law that all criminal trials are required to be in the State where committed."

* * * * * * *

"The other article, in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or District wherein the crime shall have been committed (which District shall have been previously ascertained by law) * * * does but follow out the established course of the common law in all trials for crimes. The trial is always public * * * and in the District of the offense."

(*2 Story, The Constitution*, Section 1781, 1782, 1791.)

To the same effect is Cooley:

> "The jury must also be summoned from the vicinage where the crime is supposed to have been committed."
>
> (*Cooley, Constitutional Limitations*, 8th Ed. p. 676.)

In *Callan* v. *Wilson*, 127 U. S. 541, 549, this Court quoted with approval the remarks of Mr. Justice Story above referred to and reiterated its position that the third article of the Constitution with reference to trial by jury must be interpreted in the light of the principles which controlled at common law. This Court there said:

> "And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

That at common law a jury from the vicinage was a prerequisite is a well known historical fact. See *Hale's Pleas of the Crown*, Volume 2, Chapter 34, Page 264; *Hawkin's Pleas of the Crown*, Volume 2, Chapter 25, Section 34; *4 Black. Comm.* 305, 349, 350.

The requirement that the jury should come from the vicinage was because the jurors at first were witnesses (*2 Story, Constitution*, 561, note). Reference to the history of the Federal Convention of 1787 which framed the Constitution shows not only that the delegates were intent upon preserving trial by jury of

the vicinage (using vicinage in the sense of the vicinity or the State), but that literally no other provision was even contemplated. A full history of the deliberations leading up to the adoption of Article III, Section 2, Clause 3 of the Constitution preserving this right will be found in *Farrand's "The Records of the Federal Convention"* Volume 3, page 645, index. An account of the adoption of this provision is also contained in *Charles Warren's "The Making of the Constitution,"* page 546, 547.

As seen from the records of the convention the only discussion in the Constitutional Convention with reference to the preservation of the right of trial by jury as known at common law was in favor of preserving such right in *civil* cases; it was taken for granted it would be preserved in criminal cases.

With reference to the adoption of the 6th Amendment and the further guarantee therein of trial by jury from the State and District wherein the offense was committed, Mr. Justice Story says, referring to Article III, Section 2, Clause 3:

> "But, although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousy and alarm of the opponents of the Constitution were not quieted. They insisted that a bill of rights was indispensable upon other subjects, and that upon this, further auxiliary rights ought to have been secured."
>
> (*2 Story, Constitution,* Section 1782, citing *1 and 2 Elliott's Debates.*)

The history of the reason for and the adoption of the Bill of Rights is too familiar to this Court to need much mention. The causes leading up to Amendment 6, however, may briefly be adverted to.

The Colonial records attest the fact that the colonists regarded trial by jury *of the vicinity* as an absolute birth-right, based on Magna Charta. When they resisted the Stamp Act in Massachusetts they declared that for their alleged offenses they could be tried only by a jury of the vicinage. The Provincial Congress of North Carolina on August 25, 1774, passed the following Resolution:

> "Resolved that trial by juries of the *vicinity* is the only lawful inquest that can pass upon the life of a British subject, and it is a right handed down to us from the earliest ages, confirmed and sanctioned by Magna Charta itself." (Italics ours.)

In Virginia similar words were used, to the effect that "trial by jury of the vicinage" was a birth-right.

The Continental Congress in "An Address to the Inhabitants of Quebec," 1774, made clear the inalienable rights of British subjects and referred to one of them as trial "by twelve of his unexceptionable countrymen and peers of his vicinage." The reference to the same right in the Declaration of Independence is too familiar to require quotation. Trial by jury of the vicinage, a revolt against transportation beyond the seas, was one of the "sacred rights" for which the colonies went to war.

When the time came for the States to draw up their Constitutions, this right was preserved in every case. As Jeremiah S. Black said in his great argument in Ex Parte Milligan:

> "Of the great rights they threw not an atom away. They went over Magna Charta, the Petition of Right, The Bill of Rights, and the rules of the common law and whatever was found there to favor individual liberty, they carefully inserted in their own system. * * *" (*Ex Parte Milligan*, 71 U. S. 67.)

It is well known that when the Constitution, lacking a Bill of Rights, was submitted to the States, a majority of them, in ratifying, concurred in demanding that trial by jury of the vicinage be clearly secured. North Carolina and Rhode Island refused to ratify; when in November of 1789 North Carolina finally ratified, her delegates demanded this among other amendments. Congress responded to this demand by adopting what later became the 5th and 6th Amendments, which were promptly ratified by the States.

This Court has consistently interpreted trial by jury to mean trial by jury as known at common law, a view reiterated as recently as in *Patton* v. *United States, supra.* If so it is difficult to get away from the notion that it means a jury of the vicinity. Blackstone says:

> "When the defendant has entered his plea of not guilty and, for his trial, has put himself on his country, which country the jurors are, the sheriff of the county must return a panel of jurors *liberos et legales homines de vicineto,* that is, freeholders without just exception of the *visne* or neighborhood where the fact is committed" (*4 Black Com.* 350).

The ancient writ commanded the sheriff to summon "free and lawful men of the neighborhood" (Glanville 32). Coke says:

> "And the reason wherefor the jury must be of the neighborhood is for that "*vicinus facta vicine presumita scire*" (Coke on Littleton, 158b).

It is well known that the old Tudor Statutes, passed in the 35th year of the reign of Henry VIII, creating new treasons, and permitting their trial anywhere in the kingdom, were expressly repudiated by the Whigs.

in 1768, when they were invoked in Parliament to inquire into the alleged offenses in Massachusetts Bay. Hansard in his *Parliamentary History*, Vol. XVI, pp. 479, 494, says:

> "That part of the address which proposed the bringing of delinquents from the province of Massachusetts, to be tried at a tribunal in this kingdom for crimes supposed to be committed there, met with still greater opposition than the resolves. Such proceeding was said to be totally contrary to the spirit of our Constitution."

Though the resolution was passed, it has always been regarded, by English and Americans alike, as an historical and constitutional mistake. Trevelyan refers to it as "the sport of a night at Westminster," and refers pointedly to the opposition which "commented forcibly on the cruelty and injustice of dragging an individual three thousand miles from his family, his friends and his business * * * * to be put in peril of his life before a panel of twelve Englishmen" (*Trevelyan, American Revolution*, Part 1, pp. 102, 107).

Lecky says:

> "By virtue of an obsolete law, passed in one of the darkest periods of English history and at a time when England possessed not a single colony, any colonist who was designated by the Governor as a traitor might be carried 3,000 miles from his home, from his witnesses, from the scene of his alleged crime, from all those who were acquainted with the general tenor of his life, to be tried by strangers of the very nation against whom he was supposed to have offended" (*Lecky, Engl. 18th Cent.*, Vol. III, 394-395).

He states the threat to transport accused persons to England for trial:

"excited a fierce and legitimate indignation in America and added a new and very serious item to the long list of colonial grievances" (*Lecky, supra*).

The reaction in the Colonies was immediate and extreme. The North Carolina Resolution of August 25, 1774, in favor of "trial by juries of the vicinity" has already been mentioned. The Constitutional Congress in its Address to the People of Great Britain "again denounced transportation abroad for trial." In South Carolina, William H. Drayton protested vigorously against invasion of the rights of the Colonies "By declaring that the people of Massachusetts Bay are liable for offenses or pretended offenses done in that colony to be sent to and tried for the same in England, or in any colony, where they cannot have the benefit of a jury of the vicinage." In Virginia they declared that among the Colonists inalienable Constitutional rights was "trial by jury of the vicinage."

It is not too much to say that all the colonies were up in arms over the invasion of the right and made "the cause of Massachusetts Bay the cause of all."

In New Hampshire it was declared:

> "In criminal prosecutions, the trial of facts *in the vicinity where they happen* is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried *in any other county than that* in which it is committed."

Eminent commentators on the Constitution ratify the historical sources. Jeremiah S. Black says:

> "His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they

mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the Court" (*Ex Parte Milligan*, 71 U. S. 68).

Cooley says:

"No one doubts that a trial by a jury of the vicinage is as complete and certain now as it ever was and that, in America, it was indefeasible" (*Swart* v. *Kimball*, 43 Mich. 443).

In *Trial by Jury* (Sec. 387), Justice Moschzisker, referring to the Constitutional guarantee, states that a substantial requirement is that the jurors be "chosen from the vicinage."

Justice Caldwell in *Trial by Judge and Jury*, says with reference to the Constitutional provisions:

"When the several provisions of the Constitution are read in connection we are amazed at their fullness and completeness. No more resolute and inexorable purpose to accomplish a particular end ever found expression" (The American Federationist, May, 1910).

Watson on the Constitution, after referring to Article III, Section 2, Clause 3, and the 6th Amendment states, with reference to the latter:

"This provision forbids an indictment in one State for a crime committed in another" (2 Watson on the Constitution, 1144).

The following cases are cited:

In re Rosdeicher, 33 F. 657, 658;
U. S. v. *Conrad*, 59 F. 458.

In *Armour Packing Co.* v. *United States*, 153 F. 1, 6, the Sixth Amendment is referred to as stating "the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdic-

tion in which the offense was committed." The Court in that case freely conceded and confirmed the position that if the offense of the defendant therein was committed in another State the court was without jurisdiction.

In *United States* v. *Jackalow*, 1 Black, 484, it was held that a circuit court had no jurisdiction of a crime committed in any other state than the one wherein the Court was sitting.

Hare in his Constitutional Law after referring to the desire of the people of the United States for a further safeguard, in addition to the Constitution, such as the English Bill of Rights, and the enactment of such safeguards in our own Bill of Rights, says:

> "One of these guarantees is noteworthy from the importance of the principle, and the care with which it was enforced. Agreeably to the Constitution, Article III, Section 2, the trial of all crimes, except in cases of impeachment, shall be by jury, and such trials shall be had in the State where such crimes shall have been committed,—plain words, which might seem ample to convey the idea. But so earnest was the country on this head that the guaranty was reiterated in the amendments" (*1 Hare*, 506-507).

The author the quotes the Sixth Amendment.

Chaplin, in *Principles of the Federal Law*, p. 591, states:

> "Features of jury trial, relating peculiarly to criminal cases, are: . . . adoption, in substance (for State area), by the Venue provisions of the Constitution (Art. III, Sec. 2, Amend. 6) of the Common Law principles of trial by the vicinage (with substitution of the State, and the Federal District, for the Common Law county)."

The authorities above cited seem unanimous in holding that a jury *of the vicinage* is an essential fundamental right and that historically, trial by jury meant a jury *of the vicinage*. The matter is important because in the present case *petitioners demanded a trial by jury*. The question thus confronting this Court is: What kind of a jury are they to obtain? Are they to have a jury from the vicinage as would seem their right, or are they to be put off by an extension of the waiver doctrine of *Patton* v. *United States, supra*, with some sort of a hybrid jury, not from the State and district wherein the crime was committed, as provided by the Constitution, but one summoned inadvertently by the trial court, and sustained by the Court below for the after-discovered exigencies of this particular case?

This point will next be discussed.

V.

Even Assuming the Constitutional Provisions Could Be Waived, Petitioners Did Not in the Present Case Waive Them.

To sustain the theory of the Court below, not one, but two waivers, are necessary. First, the petitioners must "waive" their "right" to be tried in Pennsylvania under Article III, Section 2, Clause 3, of the Constitution. Second, they must waive the provision of Amendment 6 to the effect that the jury must come from the State and District wherein the crime was committed. Assuming, for the sake of argument, that by pleading not guilty, petitioners waived their right to be tried in Pennsylvania, it seems a far cry to counsel to hold that in so pleading not guilty, and demanding a jury trial, in the old phrase "putting themselves

on the country" they expressed their willingness to be satisfied with less than a constitutional jury. It is true that as the jury was chosen, petitioners could have objected on the ground that they were not residents of Pennsylvania; however, it must be remembered that the alleged waiver in the present case is a waiver of the jury by implication, *i.e.*, an Appellate Court over a year after the trial concludes they waived their right on the basis of this Court's decision in *Patton* v. *United States, supra*, which had not even been decided when these petitioners were tried. The matter here involved is a striking illustration of the murky legal situation which results from the theory of waiver by implication and shows the foresight and good judgment of the caution contained in the last paragraph of *Patton* v. *United States, supra*, against courts doing precisely what was done herein.

In the present case petitioners filed a motion in arrest of judgment (R. 3-4), setting up clearly the lack of jurisdiction of the Court (R. 4).

A motion in arrest of judgment is the proper way to bring to the court's attention a jurisdictional defect:

Wharton's Criminal Procedure, Sec. 1692;
Sadler's Criminal Procedure, Sec. 516;
U. S. v. *Marvin*, 159 F. 767;
U. S. v. *Maxey*, 200 F. 997;
U. S. v. *Moore*, 288 F. 251;
16 C. J., Sec. 2770, 2773;
Demolli v. *U. S.*, 144 F. 363;
Bond v. *Dustin*, 112 U. S. 604;
Carter v. *Bennett*, 15 How. 354;
Black on Judgments, Vol. I, Sec. 98.

It is well known that in a Federal Court the lack of jurisdiction of the Court over the subject matter may be raised at any time and that jurisdiction cannot be conferred by consent of the parties.

Jackson v. *Ashton*, 8 Peter's 148.

Lack of jurisdiction of the Federal Court may be raised not only at any time during the trial but even in an Appellate Court.

Sullivan v. *Fulton Steamboat Co.*, 6 Wheat. 450;
Jackson v. *Ashton*, 8 Pet. 148;
Grace v. *American Central Insurance Co.*, 109 U. S. 278;
Robertson v. *Cease*, 97 U. S. 646;
Bors v. *Preston*, 111 U. S. 252;
Mansfield R. Co. v. *Swan*, 111 U. S. 379;
Gainesville v. *Brown-Crummer*, 277 U. S. 54.

In fact this Court has frequently said that it is the duty of the Court itself before which the case comes, whether the trial court or the appellate court, to satisfy itself that upon the record facts appear giving it jurisdiction.

Grace v. *American Central Insurance Co., supra,* and cases above cited.

If, therefore, petitioners by their Motion in Arrest of Judgment, asserted the lack of jurisdiction of the trial court, it is difficult to perceive how it can be argued that on the basis of the Patton case they gave their consent. On the basis of the previous decisions of this Court, if it be a question of jurisdiction, *they could not give their consent;* even if they gave it, it would be ineffective.

Assuming *arguendo* that the question herein is not one of jurisdiction but something less than that, there is nothing in this Court's decision in the Patton case to indicate that this Court intended to overrule its previous decision in *Thompson* v. *Utah*, 170 U. S. 353, to the effect that the defendant could not by mere silence effect a waiver of a constitutional right. With reference to *Thompson* v. *Utah*, this Court in its decision in the Patton case said:

"The case involved the validity of a statute dispensing with the common law jury of twelve and providing for trial by a jury of eight. There was no contention that the defendant, Thompson, had consented to the trial, *but only that he had not objected until after verdict.* The effect of an express consent on his part to a trial by a jury of eight was not involved—indeed he had been silent only under constraint of the statute." (*Patton* v. *U. S.*, 281 U. S. 276, 293). (Italics ours.)

It may be noted that in the present case the defendants, as in *Thompson* v. *Utah*, did not consent to the trial but only *did not object* until after the verdict (R. 3-4).

VI.

The Decision Below Seems Flatly Violative of the Spirit of This Court's Decision in the Patton Case.

In the Patton case this Court had before it an express waiver of a constitutional right entered into between the parties, who were assisted by the advice of counsel. In the present case there is an alleged waiver *by implication* of a constitutional right. It should be remembered that the trial of the present case was concluded prior to the decision of this Court in *Patton* v. *U. S.*, *supra*, at a time when defendants had a right to rely upon their constitutional rights as they were then interpreted. Certainly, prior to the Patton case, it was the opinion of most lawyers that, under *Thompson* v. *Utah*, *supra*; *Low* v. *United States*, 169 F. 86, and *Dickinson* v. *United States*, 159 F. 801, defendants in a criminal case could not waive the requirements of a common law jury with respect to number and

inferentially could not waive the other requirements of a common law jury set forth in Amendment 6 of the Constitution.

It seems to counsel that it is a fair inference from this Court's decision in *Patton* v. *United States* that waivers by implication of constitutional rights with respect to a jury trial are not to be entertained. Thus, the words of this court in *Patton* v. *United States:*

> "Before any waiver can become effective, the consent of Government counsel and the sanction of the Court must be had, *in addition to the express and intelligent consent of the defendant*" (281 U. S. 312; italics ours),

seem to require an express waiver. The further remark by this Court:

> "And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advisable discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof" (281 U. S. 312, 313),

seems adverse to a waiver by implication.

The waiver of the requirement of Amendment 6 that the source of the jury should be the State and District wherein the crime was committed, which is a restatement of the common law requirement, is on the same footing with the common law requirement, carried into the Constitution by implication, that the normal trial jury should be composed of twelve. If so, the caution of this Court contained in *Patton* v. *United States* against indiscriminate waivers of a jury of twelve would apply with equal force to a waiver of the requirement of Amendment 6 that the jury must be one of the vicinage.

Conclusion.

The judgment below should be reversed.

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APPENDIX I.

The Code of the District of Columbia (complete to March 4, 1929), title 18, sec. 43, provides:

> "43—*Jurisdiction; Powers of Circuit and District Courts Conferred.*—The said Court shall possess the same powers and exercise the same jurisdiction as the District courts of the United States, and shall be deemed a court of the United States." Mar. 3, 1863, 12 Stat. 762, c. 91; Mar. 3, 1901, 31 Stat. 1199, c. 854, sec. 61; June 30, 1902, 32 Stat. 522, c. 1329; Mar. 3, 1911, 36 Stat. 1167, c. 231, sec. 289.)
>
> "44.—*Same; General Jurisdiction.*—Said court, except as otherwise provided in this title, shall have cognizance of all crimes and offenses committed within said District and of all cases in law and equity between parties, * * *."

Section 43 above was derived from the Act of March 3, 1863, 12 Stat. 762, c. 91, which established the Supreme Court of the District of Columbia, and provided that any one of the Justices thereof might hold special terms of the said court. Section 3 then provides:

> "Sec. 3. * * * Any one of said Justices may also hold a criminal court for the trial of all crimes and offenses *arising within said District*, which court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia."

The "Criminal Court of the District of Columbia" referred to in the last sentence above was originally constituted by the Act of February 27, 1801 (Davis' Laws, District of Columbia, 1831, p. 124), Sec. 5 of which reads as follows:

> "Sec. 5. *Be it further enacted*, That said court shall have cognizance of all crimes and offenses

committed within said District, and of all cases in law and equity, etc."

The "criminal" court was constituted and named as such by Sec. 1, Chap. 128 of the Revised Code of the District of Columbia, 1857, Revision of Ould and Cross, Sec. 4, provided as follows:

> "Sec. 4. The Criminal Court shall, except when otherwise expressly provided by law, have exclusive jurisdiction in the trial and punishment of all crimes and offenses *committed within the District.*"

Returning to the amendments to Sec. 43 above, the Act of March 3, 1901, 31 Stat. 1199, c. 854, Sec. 61, provides:

> "Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia at the date of the passage of this Code."

This provision was further amended by the Act of June 30, 1902, 32 Stat. 522, c. 1329, by adding after the words "District of Columbia" in Sec. 61 above, the words:

> "Under the Act of Congress, approved March 3, 1863, creating that court, and."

The last amendment to this section made by the Act of March 3, 1911, 36 Stat. 1167, Chap. 231, Sec. 289, is simply the familiar statute abolishing the Circuit Courts and providing for the transfer of their records to the District Courts.

Sec. 44 was originally Sec. 763 of the Revised Statutes relating to the District of Columbia and read as follows:

"Sec. 763. Any one of the Justices may hold a criminal court for the trial of all crimes and offenses *arising within the District.*"

This section was amended by the Act of February 27, 1877, 19 Stat. 253, c. 69, Sec. 2, as follows:

"Section seven hundred and sixty-three is amended by striking out said section and inserting in lieu thereof the following as section seven hundred and sixty-three;"

"Said courts shall have cognizance of all crimes and offenses *committed within said District* and of all cases in law and equity between parties * * *."

A further amendment was made by Act of March 3, 1901, 31 Stat., p. 1202, Sec. 83, reading as follows:

"Sec. 83. *The Criminal Court.*—The trial of crimes and misdemeanors *committed in the District of Columbia* shall be in the Supreme Court of the District of Columbia holding a special term as a criminal court, * * *."

As above noted, the words "except as otherwise provided in this title" in Sec. 44 above, refer to the criminal jurisdiction of the Police Court and the Juvenile Court of the District of Columbia, conferred in Chap. 4 and Chap. 6 of this title. The words "except as otherwise provided in this title" are not found in any of the Acts of Congress from which Sec. 44 is derived and are apparently the addition of the codifier.

(Italics throughout are those of counsel herein.)